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IN THE
COURT OF APPEALS OF INDIANA

TIFFANY HENDRICKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0610-CR-840
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0501-FD-1

May 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Tiffany Hendrickson appeals her three-year sentence for Class D felony causing serious bodily injury while operating a motor vehicle with a blood alcohol concentration of at least 0.08. We affirm.

Issue

Hendrickson raises two issues on review, which we combine and restate as whether her sentence is proper.

Facts

On October 15, 2004, Hendrickson consumed a considerable amount of hard liquor. Hendrickson was pregnant at the time. She then drove her vehicle with her seven-year-old daughter in the backseat. Hendrickson's vehicle struck another vehicle and caused serious bodily injury to the vehicle's driver, Cathy Collins. Cathy was in a coma for five weeks and remained in the hospital for a total of eight weeks. She experienced brain damage, had several broken bones, and suffered a collapsed lung. The vehicle's passenger, Perry Collins, received a compound fracture to his arm. Hendrickson was charged with Class D felony causing serious bodily injury while operating a motor vehicle with a blood alcohol concentration of at least 0.08 and Class D felony neglect of a dependent. Hendrickson pled guilty to Class D felony causing serious bodily injury while operating a motor vehicle with a blood alcohol concentration of at least 0.08. The Class D felony neglect of a dependent charge was dismissed pursuant to the plea agreement. The trial court sentenced Hendrickson to the maximum possible sentence, three years imprisonment.

Analysis

In response to the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), our legislature amended the sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Under the post-Blakely statutory scheme, a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). For purposes of felony sentencing, an "advisory sentence" is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence." I.C. § 35-50-2-1.3.

Hendrickson committed this offense on October 15, 2004, prior to the change in the sentencing statute. She was sentenced on June 29, 2006, after the sentencing change became effective. Hendrickson and the State both assert that the prior statute should apply, and we agree. See Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006) (holding that the defendant should be sentenced under the "presumptive" statute when the crime was committed prior to the change in law), trans. denied.

When faced with a non-Blakely challenge to an enhanced sentence,[1] we must determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the

[1] Hendrickson makes no claims under Blakely.

court's evaluation and balancing of the circumstances. Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied. Hendrickson argues that the trial court's sentencing statement was insufficient in all three respects. In issuing its sentencing statement, the court first explicitly identified as an aggravator that the harm suffered by the victim was significant or greater than the elements necessary to prove commission of the offense under Indiana Code Section 35-38-1-7.1. The trial court also stated that it had considered the report of the probation officer and the statements by counsel for the State and counsel for the defense. The court then stated:

> The Probation Officer directs the Court's attention to the fact that the, uh, penalties are to be rehabilitative rather than vindictive law. And, uh, that is correct. If the Defendant were to receive an executed sentence, she would lose her substantial income. Her children might will [sic] be State supported, uh, loss of tax revenue, dim likelihood of the Defendant finding gainful employment, prospect of supporting her and her children on welfare for several years to come, in the opinion of the Probation Officer, would outweigh the benefits of incarceration. And then the Probation Officer talks about collateral penalties involved, that she has incurred attorney fees, paid for her counseling, lost days of work, meetings with attorneys and counselors, and counseling sessions. And it was a recommendation of the Probation Officer that the Court grant the evaluation request for treatment in lieu of sentencing.

Tr. p. 125-26.

We assume that the court's discussion of the Probation Officer's report was intended to serve as a list of mitigating factors. However, the court neither articulated that it considered these factors as mitigating, nor did it state the reasons why it found those circumstances mitigating.

The court then continued:

> The Court is in one of the situations where whatever it does is not going to be adequate. Law and Justice are two different things. Justice must come from God. Law is what we have with the Indiana General Assembly and the dealing with imperfect people. But the Court would note that when the Defendant initiated the particular action of this fateful day, regardless of whether her situation has changed, regardless whether she has changed, on that particular date, she was totally out of control. She had an eight (8) year old child with her when she was driving drunk. And, uh, the Court is well aware of the damage that resulted and the injuries that resulted. I cannot put these victims back together. All that I can do is impose a penalty that is provided by the State. Before we had this type of law or King's Courts, we had basically tribal law, which meant . . . the Defendant would have been turned over to the victim's families and that family would have imposed whatever penalty it thought would be appropriate. . . . [T]hey would make the punishment equal to whatever the Defendants had or whatever the victims had. The Court would impose a sentence of three (3) years and that is to be executed.

Tr. p. 126-27.

The trial court appeared to be considering as aggravating factors that Hendrickson had her daughter in the vehicle with her and that Cathy received serious injuries. The trial court did not identify these circumstances as aggravating and did not state the reasons why these circumstances were aggravating. In addition, the sentencing order did not provide an explanation of the aggravating and mitigating factors. Because the trial court entirely failed to articulate its balancing of these aggravating and mitigating circumstances, we agree with Hendrickson's contention that the sentencing statement was insufficient.

In the presence of an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Perry, 845 N.E.2d at 1096. Having found error, we elect to engage in appellate reconsideration of Hendrickson's sentence pursuant to Appellate Rule 7(B).

Hendrickson endangered her daughter by having her in the vehicle when Hendrickson had consumed alcohol. As a result of the plea agreement, the charge for felony neglect of a dependent was dismissed. Under some circumstances, it is inappropriate to consider as an aggravator the underlying circumstances of a dismissed charge. See Farmer v. State, 772 N.E.2d 1025 (Ind. Ct. App. 2002) (holding that it was improper for the trial court to consider facts relating to the dismissed charges of burglary resulting in bodily injury, intimidation, and resisting law enforcement in order to enhance a defendant's sentence for attempted murder). However, Hendrickson concedes that this factor was the "only proper aggravator" that the trial court considered. Appellant's Br. p. 7. Therefore, we will also consider it as an aggravating factor and assign significant weight to it. We also find as an aggravating circumstance that Hendrickson consumed alcohol and operated a vehicle while under a doctor's order to be on bed rest due to serious complications with her pregnancy.

Finally, we consider Cathy's injuries as a significant aggravating circumstance. Hendrickson argues that it is not proper to consider serious bodily injury as an aggravator because it is an underlying element of the offense. Henderson v. State, 769 N.E.2d 172,

180 (Ind. 2002). The State argues that because Cathy received more than one serious bodily injury, it is appropriate to consider her injuries as an aggravating circumstance. In Patterson v. State, 843 N.E.2d 723, 728 (Ind. Ct. App. 2006), we held that it was not an abuse of discretion for the trial court to consider as an aggravator that "[t]he crime resulted in consequences beyond serious bodily injury**,** i.e., death." See also Lang v. State, 461 N.E.2d 1110, 1113 (Ind. 1984) (holding that it was appropriate for the trial court to consider the severity of the injuries even though the injuries constituted the basis of raising the offense from a Class C felony to a Class A felony). Cathy's injuries were extremely significant; she was in a coma for five weeks, she suffered brain damage and a collapsed lung, she had numerous broken bones, one of her legs is now permanently shorter than the other, and she still experiences seizures due to the brain injury. She was required to re-learn how to do daily activities, such as talk and walk. Although "serious bodily injury" is an element of Hendrickson's offense, any one of Cathy's injuries was sufficient to qualify as "serious bodily injury." Due to the severity of these injuries, we find that this factor is entitled to significant aggravating weight.

Hendrickson notes that the trial court failed to mention her guilty plea as a mitigating factor. Generally, a guilty plea is accorded mitigating weight. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial. Thus, a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return." Francis v. State, 817 N.E.2d 235, 237-38 (Ind. 2004). However, a guilty plea is not automatically a significant mitigating factor. Payne v. State, 838

N.E.2d 503, 508 (Ind. Ct. App. 2005), trans. denied. In Payne, we found the defendant's guilty plea was entitled to minimal mitigating weight because the defendant received a benefit from the guilty plea in that the State dismissed three charges. Id. at 509; see also Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001), trans. denied. (holding that the trial court did not abuse its discretion in failing to accord mitigating weight to the guilty plea where the court determined that the plea was "more likely the result of pragmatism than acceptance of responsibility and remorse"). We do not believe that Hendrickson's plea was merely the result of pragmatism because she expressed remorse to the victims and acknowledged responsibility for her actions. However, Hendrickson has already received a substantial benefit from her guilty plea in that the Class D felony neglect of a dependent charge was dismissed. We therefore conclude that Hendrickson's guilty plea merits some, but not overwhelming, mitigating weight.

We consider as a significant mitigating factor that Hendrickson has no prior criminal history. See Cloum v. State, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002) (noting that the lack of criminal history is generally recognized as a substantial mitigating factor). We also acknowledge the many letters written on Hendrickson's behalf from friends, family, co-workers, doctors, and nurses which provide details of her successful career, her excellent parenting skills, and the three college degrees she received with honors while a single parent and working part-time.

Although we have identified a number of mitigating circumstances, we conclude that the weight of the aggravating circumstances is far more significant. In imposing a sentence, we consider the prior version of Indiana Code Section 35-50-2-7: "[a] person

who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances." The nature of this offense was egregious, and it resulted in horrific injuries to Cathy and threatened serious harm to her daughter. Although Hendrickson has demonstrated positive aspects in her character, we conclude that in light of the nature of the offense, the maximum sentence of three years is not inappropriate.

Conclusion

The trial court erred in not expressly identifying the aggravating and mitigating circumstances it considered and in failing to articulate the balancing of those circumstances. However, after independently reviewing the aggravating and mitigating circumstances, we conclude that the maximum sentence of three years is not inappropriate. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.